closing

IN THE CIRCUIT COURT OF
THE 11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

MARIE J. FONTANA,

Plaintiff,

vs.

PHILIP MORRIS INCORPORATED, ("PHILIP MORRIS U.S.A."), R.J. REYNOLDS TOBACCO COMPANY, LORILLARD TOBACCO CO., and BROWN & WILLIAMSON TOBACCO CORP., Individually and as Successor to the AMERICAN TOBACCO COMPANY,

Defendants.

COPY

CASE NO. 00-01731 CA01

TRIAL

Volume 26

TRANSCRIPT OF PROCEEDINGS

in the above-styled cause before the Honorable Thomas S. Wilson, Jr., Circuit Judge, at the Dade County Courthouse, 73 W. Flagler Street, Miami, Florida, on Wednesday, April 4, 2001, at 1:45 p.m.

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(The following proceedings were had at sidebar:)

THE COURT: What's the problem?

MR. MCCARRON: Judge, the reason I wanted to come sidebar, I believe in the beginning of the case you granted a motion in limine that the fact that Ms. Fontana's medical records show that she had genital herpes wasn't going to --

MR. REILLY: It never came up in the case.

MR. MCCARRON: This is a motion in limine. And secondly, we don't need to be sidebar for this, but I saw yesterday when we were doing motions for directed verdict that Mr. Engram is going to refer I guess to some portions of the Surgeon General Reports which are in evidence, about the fact that it hasn't been proven, or at that point in time the studies -- the Surgeon General suggested that more studies should be done to determine whether or not environmental tobacco smoke in general does cause COPD, chronic bronchitis and other respiratory disease.

But because of the ruling that Your Honor gave us yesterday, about the fact that -- and

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the directed verdict that we have and the instruction that the jury is going to get in terms of general causation, we feel the defendants should not be able to nullify Your Honor's instruction that they're going to be getting that it does cause it.

So any portions of the Surgeon General Reports or any argument whatsoever that environmental tobacco smoke does not cause certain diseases would be improper at that point, because the only purpose it would serve is for this jury to nullify the instruction that you're going to give them what the law of this case is.

I don't know if they're going to do it or not. I suspected that they were because of some of the exhibits that I saw. If they're not going to do it, then that's fine.

THE COURT: Anybody know anything about that?

MR. REILLY: I don't intend to discuss the Surgeon General's Report.

MR. ENGRAM: I have one thing about the Surgeon General's Report, but it doesn't relate to anything that he said.

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MR. HUNTER: Last thing I wanted, in opening statement they mentioned to the jury that I had retained a pulmonologist by the name of Christopher Breeden and there has been no evidence that I did or no evidence about him or about his opinions, so I would ask that they not be permitted to argue anything to the jury about him.

MR. REILLY: Well, that's an interesting question. Plaintiff's counsel brought up the fact that the treating physicians weren't called in this case. And I'm not sure that that doesn't create fair game on who was available to be called and who didn't get called.

MR. HUNTER: The jury has no evidence about Christopher Breeden whatsoever.

MR. REILLY: They know from my opening statement that you listed him as an expert. He is listed as an expert in this case. He's a pulmonologist and they didn't bring him. And they commented on the failure to bring -- as a matter of fact, they went so far to say that we failed to bring the treating physicians. That's an extraordinary statement.

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THE COURT: You're saying you mentioned in opening statement. I have to take your word for it.

MR. REILLY: What I said was that the plaintiffs have listed and Mr. Hunter, until the close of his evidence, never withdrew Dr. Breeden as an expert listed in this case. You'll recall that before we went to trial we withdrew certain experts so that they were no longer listed in the case. Mr. Hunter retained Dr. Breeden on his list. As a matter of fact, he even listed him as somebody that was going to be coming to testify to trial. We got him on our list of people.

THE COURT: I certainly remember his name.

MR. REILLY: On the list for 48 hours they told us he was coming.

THE COURT: I think it's fair game.

MR. HUNTER: But the jury has not heard anything about Dr. Breeden. What he said in opening was not --

THE COURT: You've got a point there, that he's an expert.

MR. HUNTER: The jury has never heard anything other than --

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MR. REILLY: Mr. Hunter is partially right. If you list somebody on your list of experts, then you remove them as you did, then they can't be identified. But where you keep them on your list and where you --

THE COURT: Why would that make any difference? If they don't call somebody, they don't call somebody. There's no evidence of it one way or the other.

MR. ENGRAM: The case law provides for that, Your Honor. As long as they've not withdrawn the witness, you can comment on the fact that the witness was retained by the party.

MR. HUNTER: I dispute that. I've never seen a case of that.

THE COURT: I'm not familiar --

MR. ENGRAM: I'll find the cite for you.

THE COURT: Let me do this while he goes and looks. We have a problem, a question with corrections as far as the grammar in the instructions.

Mr. Geraghty, you said "in order to be regarded as a legal cause of loss," that should be stricken.

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MR. GERAGHTY: You're giving legal cause, concurring legal and intervening cause. When you get to intervening cause, it says very clearly, you shouldn't repeat that first sentence, if you give the concurring cause. You say it in the concurring cause, then they have it repeated and that instruction says you shouldn't repeat it if you've already given it.

THE COURT: Let me see what the charge says.

MR. GERAGHTY: I think it's listed in the concurring cause. Yes, I've got that in there.

THE COURT: This is the first one. I think it's the order that it's given in.

MR. GERAGHTY: You've got the legal cause instruction that begins with environmental tobacco smoke. The next one is concurring. It says, "In order to be regarded." They've got it there. Then they repeat it in the very next one and that's where it should be stricken.

THE COURT: I think he's correct.

MR. HUNTER: Unfortunately, I like that one.

THE COURT: Okay. I'm going to scratch it from mine.

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MR. GERAGHTY: One other housekeeping matter. I assume you're going to just charge the jury before we're done with closings?

THE COURT: No, I'm not going to.

MR. GERAGHTY: Will we have an opportunity --

THE COURT: We're going to be too late in the day. I'm going to tell them that we're going to send them home and give them an opportunity to come at 9:00 in the morning and start at 9:00 or start at 10:00.

MR. GERAGHTY: But you'll instruct them in the morning?

THE COURT: Yes.

MR. UPSHAW: The Heddendorf case, which requires that they cite the numbers they're going to use for damages in the close and not in the rebuttal. Just so the Court is aware of it. I didn't want to have to get up between our closing and the rebuttal.

THE COURT: Do you have a copy of this case?

MR. UPSHAW: Yes.

THE COURT: I want to see it.

MR. HUNTER: There's no evidence

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whatsoever of Dr. Christopher Breeden. The fact that I retained him as an expert and decided not to use him can't be argued to this jury, because there's no evidence that this jury would have to base any finding on that.

MR. ENGRAM: By either side.

THE COURT: By either side.

MR. HUNTER: The jury knows nothing about him.

THE COURT: You can't say --

MR. ENGRAM: They said in their opening that you were going to hear from Dr. Christopher Breeden, and they never heard from him.

THE COURT: No mention of Breeden.

MR. HUNTER: That's all I wanted.

THE COURT: I certainly don't want to hear you saying -- what I'm saying is that you all did not mention in your opening statements anything to do with Breeden, and you can't get up in your rebuttal and say, "You heard the defense say Mr. Breeden was going to be called and he was never called."

MR. HUNTER: I won't say that.

MR. REILLY: Am I permitted to say they

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didn't call a pulmonologist?

THE COURT: Fine. The specialty, no problem.

(The sidebar conference was concluded, and the following proceedings were held in open court:)

THE COURT: Mr. Hunter, are you ready?

MR. HUNTER: Yes, sir.

THE COURT: Mr. Engram, are you ready?

MR. ENGRAM: Yes, Your Honor.

THE COURT: Todd, bring the jury in.

(The jurors entered the courtroom.)

THE COURT: Good afternoon, ladies and gentlemen. Hope everybody had a good lunch. What we're going to try to do is -- didn't do it this morning and I should have. They have two and a half hours to speak to you. Some time, if you all need to get a break, raise your hand and let us know. I'd like to be able to go through uninterrupted, but if something comes up.

Mr. Engram, are you ready?

MR. ENGRAM: Yes, Your Honor.

I'll wait for everybody to get their pad, Judge.

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Ladies and gentlemen of the jury, this afternoon I want to start off by talking about Ms. Fontana's exposure to environmental tobacco smoke in the airline cabin.

Exposure isn't the central issue in this case, though. It's one, it's related to one of the two issues that you have to decide. Let's talk about that briefly here.

Do you remember back when this case started, Judge Wilson, in his preliminary instruction to you, told you that it is the plaintiff's burden to prove first that she has chronic bronchitis, emphysema or chronic obstructive pulmonary disease or an aggravation of an existing condition; and two, that her exposure to secondhand smoke was the specific cause? Remember we had a lot of discussion in opening about specific cause of the disease or aggravation claimed by her?

Those were your marching orders, so to speak.

Now, we heard a little bit about what is meant by "legal cause" in this case. And the Court is going to charge you before this case is over. And this is something that the

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plaintiff's attorneys didn't mention. But the Court is going to charge you that you must decide whether it can be said that but for, but for her exposure to environmental tobacco smoke, her damage would not have occurred.

So they have to prove through the evidence in this case that but for her exposure to environmental tobacco smoke, she wouldn't need a lung transplant, she wouldn't have the diseases that she claimed. They didn't tell you about that jury charge that you're going to have.

Mr. Reilly is going to talk with you about these issues about which diseases she has or claims she has, and about whether they have met this "but for" test, this test of specific causation in the case.

Let's look briefly, though, at how much environmental tobacco smoke Ms. Fontana was exposed to. And to do that, you remember we looked at what ETS is, how much was she exposed to on the aircraft, and how often was she in that environment.

Dr. Ogden from RJ Reynolds gave you two definitions of environmental tobacco smoke: A

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simple definition and a technical or scientific definition.

And I won't go into those now, but the primary difference is in the concentration or the dilution of environmental tobacco smoke when compared to mainstream smoke and sidestream smoke. That's the primary difference.

But let's not rely just on what Dr. Ogden told you about that difference, because the Surgeon General told everyone in 1986, and you'll have this document back with you, it's very lengthy, but if you want to turn to Page 24, you'll see that the Surgeon General says that the differences in mainstream and sidestream smoke and ETS occur because sidestream smoke is diluted very rapidly.

What does a nonsmoker inhale? The plaintiffs have had this row of seats from the airline cabin here, trying to convince you that flight attendants inhale sidestream smoke.

What did the U.S. Surgeon General say about that? The U.S. Surgeon General says, a nonsmoker inhales environmental tobacco smoke and does not inhale sidestream smoke.

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It's not just Dr. Ogden that's telling you this, ladies and gentlemen, it's the United States Surgeon General.

What do they tell you about the difference between measurements taken, what does he tell you, the Surgeon General, tell you about differences in measurements taken in experimental mainstream and sidestream smoke chambers?

He says, these measurements differ from the measurements that can be obtained in the real world. And that's what Dr. Ogden has spent 15 years doing, developing methods, identifying the markers, and going out and actually measuring environmental tobacco smoke in real-world environments.

Did the plaintiffs bring you a single witness who had done that, who had done and developed a methodology for measuring this? They did not.

Let's talk about their nonscientific evidence for a minute. Because the plaintiffs brought -- to show you how much ETS Ms. Fontana was exposed to on airplanes, they brought you four other flight attendants. And let's look

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and see what they have in common with Ms. Fontana.

They brought you five flight attendants. Four of them -- I want to talk about the first four. The first four, none of them flew for TWA. None of them flew for TWA when Ms. Fontana flew for TWA.

Some of them -- the lady from California, she flew for American and she only flew domestic; she never flew international flights.

What else do we know about those four flight attendants? Not a single one of them had ever met Marie Fontana.

All four of them, though, did have something in common. All four of them are represented by that gentleman there, Steve Hunter, in their own lawsuits against the tobacco companies.

All four of them testified in this case, in Ms. Fontana's case. Mr. Hunter asked them to. And at least Judith Adams admitted that by testifying in Ms. Fontana's case, she hoped that it would help her own case.

So you have to look at the motivation of those four people in coming here to this Court

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and in testifying in this case.

Let's look, though, at the fifth flight attendant, Gail Pehling, who flew for TWA for 26 years, retired, and now flies for American.

In the 26 years of flying for TWA, many times with Marie Fontana is what she said, did she ever get sick as a result of her exposure to environmental tobacco smoke? No. After 26 years of flying for TWA, did Gail Pehling file a lawsuit against the tobacco companies? No.

She and Ms. Fontana are friends. They started getting together, I think, when they both happened to move here in 1987.

Now, a lot has been said about Ms. Fontana's exposure in the '70s and in the '80s. And the fact is there isn't much information today about her work history and there's very little information about her medical treatment. But Ms. Pehling testified that Ms. Fontana didn't start coughing until about 10 years ago, which would put that back to 1991.

And what do we know about 1991 and Ms. Fontana's exposure and her health? We know that in 1991 she had perfect attendance; she

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never missed a day from work. We know that in 1991 -- you'll have the medical records. We've identified the three lung doctors, the pulmonologists that she treated with. In 1991 she was treating with Dr. Jonathan Greene, and we know that in 1991 she never saw Dr. Greene; she never saw a lung doctor.

So 1991 we know that Ms. Fontana, up until that point in time, had developed sarcoidosis but had not been affected by her exposure to environmental tobacco smoke on aircraft.

Did she have a cough in 1991? Well, we know that Dr. Greene did see her in January of 1992, and he said: "The patient has chronic sarcoidosis. She hasn't been here in two years. The patient complains of shortness of breath." And then he notes in January of '92: "No cough."

So that's what information we get from Gail Pehling and their exposure to environmental tobacco smoke on TWA aircraft.

Let's look at, what expert witnesses did the plaintiff bring to court to testify about how much environmental tobacco smoke was Ms. Fontana exposed to?

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Now, the videotapes of the witnesses, the experts that were presented, none of them ever mentioned Marie Fontana's name. None of those experts knows Marie Fontana, has evaluated her work history, has evaluated her exposure to environmental tobacco smoke. None of them have offered any opinions on the precise issue in this case, specific causation: Did ETS, in fact, cause Marie Fontana's claimed illnesses?

Now, they did bring Charles Irvin from Vermont. And remember, he's a Ph.D. scientist, not a medical doctor. He's the doctor that brought the pig lung into court.

What do we know about Dr. Irvin's expertise? Well, we know that during Mr. Hunter's opening statement to you, he told you that he looked around the country to find out who knows about sarcoidosis. And what did he find? He found a person who doesn't treat patients. He found a person that when asked the question here at trial, right in front of you, ladies and gentlemen: "Let's talk about your expertise in sarcoidosis. You don't do research in the area of sarcoidosis; isn't that correct?"

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"That's correct."

"And when you're in Denver," in spite of what Mr. Hunter said, "did you do any research on sarcoidosis?"

"No."

"Do you have any publications on sarcoidosis?"

"No."

"And what about environmental tobacco smoke? You have no publications on environmental tobacco smoke or secondhand smoke, do you, sir?"

"No, I don't."

What did he say in response to a question that Mr. Hunter asked about how much he was charging? What kind of expert did he tell you he was? He told you that he realized that he needed to do a lot more literature search, learning more about these things: sarcoidosis, environmental tobacco smoke. "And I'm not charging Mr. Hunter's firm for that time, because I'm educating myself."

This man that they hunted all over the country for and brought him in here and purported to you, represented to you that he

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was a nationwide expert on sarcoidosis and environmental tobacco smoke, wouldn't even charge Mr. Hunter because he didn't know about that until Mr. Hunter had given him a call and he spent this time learning about it. What kind of expert is that, ladies and gentlemen?

I asked Dr. Irvin another question, too. I asked him this question about measuring mainstream smoke and sidestream smoke, and I said, "Are they collected in scientific chambers?"

And he said, "Yes, they are."

And I asked him, "Have you ever been involved in a study where mainstream smoke and sidestream smoke were collected?"

Now, you saw the picture of those scientific chambers; Dr. Irvin had not. But you saw also the sidestream chamber that Dr. Ogden showed you about how the cigarette is put in this chamber. It's lit through this end and then it is measured, the sidestream smoke is measured out this end.

What did Dr. Irvin tell you? When I asked him, "Have you ever been involved in a study where mainstream and sidestream smoke were

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collected in scientific chambers?"

And he said, "No. I've been in plenty of chambers with sidestream smoke, though."

Dr. Irvin didn't even know what a sidestream smoke chamber looked like.

The Judge will tell you that you can give -- that you can consider the testimony of experts and give them the credit and weight you believe that they are due. And, ladies and gentlemen, I believe that based on Dr. Irvin's own admissions, you can hardly believe that he was an expert in medicine, that he was an expert in sarcoidosis, and you certainly cannot believe that he was an expert in environmental tobacco smoke.

What kind of expert was Dr. Katherine Hammond, the chemist from California that you saw on videotape?

Mr. Hunter made quite a few comments about Dr. Ogden this morning. I just want you to look at who's developed the official method for measuring environmental tobacco smoke in this country and in the world. Dr. Ogden told you that he developed it; that the American Chemical Society has adopted his methods for

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measuring environmental tobacco smoke; that the Association of Official Analytical Chemists, the American Society for Testing and Materials, the National Institute for Occupational Safety and Health, and the International Standards Organizations have all adopted Dr. Ogden's methods of measuring environmental tobacco smoke in the real world.

Has any organization ever adopted the method that Dr. Hammond used to measure environmental tobacco smoke and to calculate cigarette equivalents? No.

And, remember, Dr. Hammond never mentioned Marie Fontana by name, never had a specific causation opinion with respect to Marie Fontana and environmental tobacco smoke.

There are three things, though, that Dr. Hammond said that Dr. Ogden didn't disagree with. This was on March the 23rd when you heard her videotape testimony. With respect to her ETS measurements, 7 rows away from the smoking section she said: "One of the measurements was less than detectible." They could not measure it with the equipment they had. The other was tiny, teeny-weeny, weeny.

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That's how Dr. Hammond, a scientist, described the level of environmental tobacco smoke she measured in an airplane, a commercial airplane with flight attendants and passengers. And she called it tiny, teeny-weeny, weeny.

What else did she say? She said that when we measured it on those four flights -- they studied it on four flights -- they found a huge difference in the exposures: Over 100 times, 100-fold difference from flight attendant to flight attendant. That's why she can't give a Marie Fontana specific-causation opinion.

And what else did she say? She said: "Let's compare this -- let's compare the cumulative exposure of flight attendants." And that's saying, let's look at it over the course of a year, how much environmental tobacco smoke, based on my study, is a flight attendant exposed to, and let's compare that to somebody else's exposure, in this case being married to a smoker.

What did she find out? She found out that being a flight attendant, you end up getting only one-fifth of the environmental tobacco smoke, when compared to somebody married to a

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smoker.

Now, I don't remember whether we asked you all whether you had been married to smokers or not, but if you had been, there's a five-fold difference in the exposure.

We've talked about dilution and concentration. Dr. Teaf spoke about that, Dr. Ogden spoke about that. Dr. Ogden used the same -- used the cigarette equivalents method in calculating the annual exposure, the exposure in a year that a flight attendant has, to between two and five cigarette equivalents in one year.

Dr. Teaf doesn't do cigarette equivalents. He's not gone out and conducted environmental tobacco smoke measurement studies. But what does he do? What does he do day in and day out for the State of Florida, for Florida State University, for Florida A&M University? What does he do in his practice as a toxicologist?

He goes out and evaluates those exposures based on what's in the literature. And then he compares them to what the federal government says are permissible levels, what are the what we call OSHA PELs.

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So we have two different ways of people evaluating Ms. Fontana's specific exposure.

But what else, what other information did they consider? Dr. Ogden and Dr. Teaf reviewed Ms. Fontana's depositions, reviewed her employment records, which at least for four years we know what hours she flew, what routes she flew. The routes are important, because while she may have been flying every week, she was not flying every week on planes where smoking was permitted.

And then both of them reviewed all of the airplane-exposure studies that have been conducted.

But did Dr. Foley or Dr. Irvin or Dr. Hammond review any of this information specific to Ms. Fontana? They didn't.

And this is a case about specific causation. That is the issue you have to decide.

Remember, Dr. Teaf compared Ms. Fontana's exposure on the airplane to the exposure of someone who lives with a husband or wife who smokes. And one of the things that you have to remember is that Ms. Fontana flew on average

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800 or 900 hours a year. Now, you and I work in an average year 2,000 hours if you work a 40-hour work week. So she is not in an airplane where smoking was permitted or not permitted -- I mean, you know, her total flight time was between 800 and 900 hours a year.

Then you have to look at what evidence do we have that suggests how much time was spent on nonsmoking flights, how much time was spent on smoking flights, to calculate her exposure.

But what we know is that Ms. Fontana's exposure, when compared to someone whose married to a smoker, is four to ten times below that exposure.

We know that Dr. Teaf also compared her exposure to someone who's exposed to environmental tobacco smoke in the workplace, and that exposure was two to five times below the typical workplace exposure. And it's a function of how many hours she worked and how many of those hours were spent on nonsmoking flights.

We did talk about airplane ventilation. And you had someone from Boeing come and testify about how much ventilation there was in

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the plane, and about the different ventilation systems in aircraft.

You'll have the videotape.

Your Honor, do we have something that will permit them to view the videotape if they wish?

THE COURT: If they need it, yes.

MR. ENGRAM: You'll have the videotape that Rod Sands showed you, if you have any question about that item of evidence.

But, remember, these are the planes that she flew on. These planes with the solid blue lines were planes that she flew on that had what they call that one-pass, where the air comes through and passes through just one time with no recirculation.

And this tells you how often on those planes, how many times per hour: 12 times per hour, that's once every 5 minutes; 27 times per hour, that's almost every two minutes, the air is cleaned out of the plane.

In this instance, when there's recirculation, not all the air is recirculated. There is some outside air brought in and there is some air that's recirculated. And that's why there's a difference in the color on these

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bars for the 747 and the 767.

But you can still -- Mr. Sands told you that on average 21 times every three minutes the air was refreshed on the 747 and the 767. She didn't fly the 767 very much.

The outflow valves, you've seen those pictures. We've never suggested that people didn't smoke on airplanes. We know that on airplanes smoking was permitted at different times. We know that part of the system, part of the ventilation system, provides for a way to filter that smoke with those filters that Mr. Sands brought to you. And we know that there's this outflow valve, and you'll have those photographs.

The outflow valve proves that the ventilation system worked on these planes. It proves that it brought that air, that smoke out of the planes, when it left a residue on the side of the plane. We never said that there wasn't tobacco smoke on the planes. All we've said is that the ventilation systems work in drawing that smoke out of the plane.

Mr. Sands also testified, told you that the government keeps records on how full planes

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are. And he told you that in the 1980s, the record showed that between 60 and 70 percent of the plane was full on average.

And so when Ms. Fontana testifies that the planes were full and the smoking section, which had 148 seats in it, in the E zone, was full, we know that the government records show that on average for the airlines the load factors -- that's what they call it -- had only 60 to 70 percent of the people on the plane.

And what did Mr. Sands say about the 747, the largest plane that Ms. Fontana on? The largest plane she flew on, the 747, he said at any given time, you would have only 30 or 40 people smoking cigarettes.

And Ms. Pehling said, you know, coming over to Europe when the flights are at night, people don't smoke; they're sleeping, trying to catch a cat nap or whatever. So we know that smoking didn't continue continuously with 148 seats with somebody with a cigarette lit the whole time.

You know people who smoke. You know people don't smoke constantly 24 hours a day.

What about John Pakulsky? Mr. Pakulsky is

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the retired flight engineer for TWA. He talked about ventilation systems, too. He said that normally there were three air conditioning packs on these planes. On the 747, clearly there were three.

And what did he tell you? Normally two air conditioning packs were sufficient to do the job to keep the air clean. The third pack, the third air conditioning pack is there as a back-up, it's there in case one of the other packs breaks down, because you have to process that cold outside air, you have to have it pressurized, you have to have it air conditioned. You have to do those things. So you run, you design these planes with two packs, and two packs are normally sufficient, but they have this third pack.

Now, some of the flight attendants said, "We could never get the pilots to turn on that third air conditioning pack."

What did the pilot tell you? The pilot told you that if there was ever an occasion when the request was made to turn on that third air conditioning pack, did he ever turn it down? No. He said, "That's part of my job, to

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be sure that we had that third pack turned on when the flight attendants asked for it."

Let's talk a little bit about how often Ms. Fontana was in that airline cabin environment. And as I said earlier, we don't know much about her work history from 1972 up until March of 1986. And we don't have medical records for this period of time either.

But we do know -- you remember Mr. Reilly's time line from his opening. We do know that Ms. Fontana was out on strike from March of 1986 until August 16th of 1988, about two and a half years.

So we know that during the '80s, during this two-and-a-half-year period of time, she was not exposed to environmental tobacco smoke on airplanes.

We know, too, that when she came back, she was put in charge of the flight crew. She returned as a flight attendant, but they called her a flight services manager because of her seniority.

Now, she did that job for only about a year, though, because in the medical records, we can tell that for seven months, from

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September of 1989 until April 1st of 1990, Ms. Fontana was on medical leave. The medical records show that she had a heart condition that her doctors wrote to TWA, and said: "This lady, because of her heart condition, doesn't need to be -- have the stress of being a flight services manager." And he said: "Let's have her return to her duties as a flight attendant, not as a flight services manager."

Now, did that doctor ever suggest to TWA that Ms. Fontana should not return to her duties as a flight attendant on flights where smoking was permitted? There's not a doctor -- there are three or four letters in her TWA employment file, which is evidence in this case. You'll have them in the jury room. None of those doctors ever told TWA, Marie Fontana needs to work on nonsmoking flights because tobacco, environmental tobacco smoke is causing aggravation or worsening of her sarcoidosis, is causing emphysema or chronic obstructive pulmonary disease or chronic bronchitis. It's not in the TWA file.

And we know, too, some of these other things. We know from the medical records --

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and you know, she has gone to doctors, but the issue in this case is lung disease. And so we focused on going to doctors and going for treatment, respiratory treatment, coughs, colds, sarcoidosis, whatever.

But we focused on lung doctors, and we know that in 1990 and 1991, when she had gone back to flying, that she did not go see a lung doctor in either of those years. And we know also that in all of 1994, no lung doctor visits.

I'm not saying that Ms. Fontana didn't have sarcoidosis. What I'm saying is that her sarcoidosis was controlled with her medication and that her exposure to ETS, when she flew, didn't cause her any problems.

The bottom part of this relates to some significant events as it relates to government regulation or TWA's regulation of smoking on airplanes.

The Court has taken judicial notice of these facts, ladies and gentlemen. And there's been no evidence to suggest anything different in this case. We know that on July 10th, 1973, the federal government enforced a regulation

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separating sections for smokers and nonsmokers on aircraft.

We know that on April 30th, 1988, smoking was banned on flights in the United States shorter than two hours.

We know two years later, February 25th, 1990, smoking was banned on all flights shorter than six hours, including flights to and from Puerto Rico.

And you'll have the TWA handbook, if there's any question about that, the flight manual. But the Court has taken judicial notice that smoking was banned on all flights beginning February 25th, 1990, including flights to and from Puerto Rico.

And then finally, Ms. Fontana admitted when I asked her the question: TWA banned smoking on flights to Paris, France, Frankfurt, Germany and London, England beginning March 2nd, 1996.

We've prepared a chart of Ms. Fontana's flight history from the records. And as I said, we only have these four years of records.

Look at the flights that she took from 1993. The blue flights are smoking flights.

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The yellow flights are nonsmoking flights. And in 1993, she flew 22 more smoking flights than she did nonsmoking flights.

We know that in 1994, a year she never went to the doctor, she flew 30 more smoking flights than she did on nonsmoking flights.

We know in 1995, all of a sudden in 1995 the number of nonsmoking flights that Marie Fontana took tripled from 52, almost tripled to 148. And the number of international flights she took dropped to 36.

And we know that in 1996, that year, it was December of '96 that she got the bleeding in her lungs. We know that in that year she took 121 flights where smoking was banned, and only 20 flights where smoking was permitted.

And as I said earlier, I'm not suggesting that Ms. Fontana wasn't sick with sarcoidosis. What I'm trying to say is that the medication that she took controlled it, and that her flights where smoking was permitted did not result in her having to seek medical treatment.

I asked you when I opened, ladies and gentlemen, to give the defendants a chance to be heard, because our case would go second. I

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talked about the fact that it's kind of like a baseball game, and the plaintiffs got to get -- they're the team that gets to bat in the top of the inning and we're the team that gets to bat in the bottom of the inning. And they don't win because they scored a run in the first inning. We get to play nine innings and we get to have the last at bat.

Now, you've learned a lot in this case about environmental tobacco smoke. You've learned a lot about the markers, and the method and the kind of measurements that have been made. And I know it's been a long two and a half weeks. And the defendants' case has been a scientific one, because the science establishes what her exposure was. And the defendants' case is a medical one, and Mr. Reilly is going to talk about that medical case, because that medical case is the central issue that you have to decide in reaching your verdict in this case.

What has happened here is that the plaintiff's attorneys, in presenting their case, have ignored the medicine, have ignored the medical records and have ignored the

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science.

They've created a fiction that they presented to you based on what other flight attendants, who are represented by Mr. Hunter, want you to believe.

On behalf of my clients, on behalf of my co-counsel, I want to thank you very much for your attention, your note-taking, the hard work that you put into this case.

At this point, I'm going to ask Mr. Reilly to talk with you about this central issue in the case, and that is, whether Ms. Fontana has any of the diseases that she claims to have.

Thank you.

MR. REILLY: Your Honor, it will take me just a minute to get my stuff set up.

THE COURT: Take your time.

MR. REILLY: Okay. Good afternoon. Sorry for the delay.

Mr. Engram is right, that I'm going to talk to you about the real issue in this case, the issue that has always been the real issue in this case. Mr. Hunter spent, I would say, half of his time in his closing argument talking to you about this issue of general

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causation, whether or not environmental tobacco smoke can cause or does cause chronic obstructive pulmonary disease, whether it does cause emphysema, whether it does cause chronic bronchitis.

You know how much time we spent on that issue, presenting evidence to you in this case? I'll bet you can't even remember any evidence on that point, because that's how long we spent on it.

What was the issue that we spent, that I spent on cross-examinations of their medical witnesses, on direct examinations of our medical witnesses, how much time did we spend on what is wrong with Ms. Fontana? To be quite honest with you, remember when I stood before you and gave you my opening statement in this case, I talked about what Mr. Engram talked about. And I started off by telling you, I'm only talking about this exposure issue because the plaintiffs raise it. That isn't what this case is about. What this case is about is, what is wrong with Ms. Fontana? And that's what we showed you in defending this case.

Before I get too far into my opening

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statement, let me tell you that there are two more counsel sitting there, three more counsel sitting at the table actually. And in order to make this presentation concise, efficient and because of your patience and how attentive you've been, we've agreed that I'll make the final closing argument and the other lawyers, Tony Upshaw, Bill Geraghty, are not going to make a closing argument. So this is it.

And remember, Mr. Engram just got through telling you that on this issue, what illness does Ms. Fontana have and whether it was caused by environmental tobacco smoke, that burden is on plaintiff's counsel, squarely on the shoulder of the plaintiffs.

We've got some instructions.

Can we pull up the instructions? Actually, I think we start with 3 point -- no, I'm sorry.

The issue that Judge Wilson is going to raise before you in his instructions for your determination is whether exposure to environmental tobacco smoke was a legal cause of loss or injury or damage sustained by her.

See 3.7, please.

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The next instruction is going to tell you -- I don't know if you can read that or not. Okay. If the greater weight of the evidence does not support her claim, does not support her claim, then your verdict should be in favor of the defendants.

Now, Mr. Hunter talked about, maybe Mr. Gerson as well, talked about the scales of justice. And they talked about the balance of those scales. And when we came in this courtroom, the balance of those scales on this issue was completely in favor of the defendants. And it's Ms. Fontana and her counsel's job, it's her lawyer's job, through the greater weight of the evidence, to shift that balance, not just to even, but to be in her favor, on whether or not she has chronic obstructive pulmonary disease, emphysema or chronic bronchitis. That's her burden in this case.

And she has to prove that environmental tobacco smoke was a substantial cause of the development of those diseases.

But I'm telling you right now, the focus of our defense has been, does she have those

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diseases at all? That has been, quite honestly, the beginning, middle and end of the vast majority of our case.

Mr. Gerson talked about -- as a matter of fact, Mr. Hunter listed -- he's taken his list down now, of all the witnesses he brought here. Had a big, long list. I know you remember it. It just happened this morning.

How many treating doctors were on that list?

Where is that board of all the treating doctors?

Here is the list, ladies and gentlemen, and I need to add a name to this list. I need to add the name of Dr. Allen Schwartz, because he's Dr. Coopersmith's -- I don't know if they're partners or not, but he's the additional pulmonologist that came to the aid of Ms. Fontana back in January of 1997. And I need to add his name to this list.

I wear glasses for distance and that's too far for me. But I guess you can read that.

Do any of those names, other than Dr. Gardiner -- and you got to see Dr. Gardiner yesterday. You got to assess for yourselves

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why Dr. Gardiner is the only treating physician, the only one, the only radiologist out of all those folks, the only pulmonologist -- he's not a pulmonologist, but of all the radiologists and pulmonologists that examined Ms. Fontana's X-rays, out of all the doctors who gave care to Ms. Fontana for her sarcoidosis, he is the only one that ever said anything that's remotely favorable to the plaintiffs.

And you got to assess for yourselves yesterday how much he knows about sarcoidosis. You got to assess for yourselves yesterday whether or not he even knows what Stage IV sarcoidosis looks like radiographically.

Ladies and gentlemen, Mr. Gerson implicated or implied, I'm sorry, implied that for some reason if these folks walked in this courtroom, we would vigorously cross-examine them.

When I was in law school, I had a law professor who taught property. And I don't know if you've ever seen any of the movies or television shows about what law school is like, but they love to take -- professors love to

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take law students down and they love to have them sit there and answer questions, and because when you're a law student, you don't know anything -- when you're a lawyer my age, you still don't know anything -- but this one professor loved to say to most of my answers, "Mr. Reilly, this is hogwash," and most often he was probably right. But to Mr. Gerson's representation that if those folks -- would you please put that back -- if those folks came in this courtroom, we, the defendants, would vigorously cross-examine them and embarrass them, that is just plain hogwash.

Ladies and gentlemen, we embrace the medical records of those folks, because you know what they say? They say sarcoidosis over and over and over again.

Can we have Mr. Gerson's opening statement?

In our opening statements, Jonathan Engram and I indicated to you that we would be bringing regional experts, regional experts and nationwide experts in radiology and pulmonology to talk to you about Ms. Fontana's condition. And we did. We brought you Dr. Koenigsberg

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from right here in Miami. We brought you Dr. Ingram. You're exactly right, he is one of the preeminent pulmonologists in this country today.

But more than that, I am bringing you these medical records from the treating physicians. They've been marked, out of all the medical records, because every medical record ever generated that we've been able to locate on Ms. Fontana we have put in evidence. But I will tell you that an awful lot of them pertain to care and treatment that isn't really pertinent to this litigation.

And in order to assist you in working your way through the medical records in this case, I have separated out the radiology reports and the pulmonology information. This includes the pulmonology records of the pulmonologists, as well as the pulmonary function tests, the flow-volume curves, those reports. I've put this all together in Exhibit 2 and it's these two small binders. And they will go back with you to the jury room, and you will have access to them there.

I've done this so that you don't have to

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comb through that mountain of medical records to find these really pertinent records.

Now, these records were generated, not by experts hired by either side in this lawsuit, these records were generated by men and women who had the task, the awesome task that any treating physician takes on. What is that awesome task? It's to properly diagnose and properly treat their patients.

That is an enormous responsibility. It's a responsibility that I've never had, it's a responsibility that no one in this room has ever had. But I venture to guess, ladies and gentlemen, that every one of -- excuse me. I got ahead of myself a little bit. I venture to guess that every one of those physicians, whose names appeared on that list that was just on this screen, takes their job enormously, enormously seriously.

And when they generated their records, were they thinking about litigation? Were they thinking about a lawsuit against the tobacco industry? Of course not. What were they thinking about, when over and over and over again they diagnosed sarcoidosis, and didn't

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diagnose chronic obstructive pulmonary disease, didn't diagnose emphysema, didn't diagnose chronic bronchitis?

Were they living in the dark ages, as Mr. Gerson would have you believe just a moment ago, in the Reagan era? Actually, not one of them treated Ms. Fontana in the Reagan era. They treated her in the age of cell phones and computers and CT scans and pulmonary function tests.

As a matter of fact, as you get down to the bottom of that list, Dr. Fishman -- they're too talented. Dr. Fishman, you know what those double zeros stand for? The year 2000. I venture to guess there must be probably 15 cell phones in this room. And I don't know how many personal computers.

Dr. Coopersmith, this date is 3-12-01. Dr. Coopersmith saw Ms. Fontana the week before this trial started. Dr. Coopersmith is still treating Ms. Fontana.

Please, look at his records. Look at his records up to today and see if he says she has emphysema, if he says she has chronic bronchitis. See if he says she has chronic

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obstructive pulmonary disease. Please.

Look at the Jackson Memorial Hospital records. This is an institution -- can we go now to Dr. Gerson's opening statement?

When Mr. Gerson gave his opening statement when this case started, he knew, just as all the plaintiff's lawyers knew, just exactly where every one of the treating physicians stood on the issue of what's wrong with Ms. Fontana.

Let's see what he said. He said, "The defendants will say that Marie's doctors did not make this diagnosis according to their records. And they are right."

We are right; they did not make such a diagnosis. They didn't diagnose chronic obstructive pulmonary disease, emphysema or chronic bronchitis, ever. With the exception of Dr. Gardiner.

In 12 years, in 12 years of her care and treatment, not only did they not diagnose it, but in a little bit you'll see oftentimes they said there's no evidence of an obstructive disease.

Let's see what Mr. Gerson went on to say.

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He said: "The fact is, the truth is that Marie's doctors never found it because he," you could put they, "never looked for it." That's the position of the plaintiffs in this case. That was the explanation for this incredible list of physicians who say she doesn't have what they say she has.

He says, "Because they never looked for it." In fact, ladies and gentlemen, you'll see repeatedly, radiographically, by pulmonary function testing, by physical examination, they were looking for whatever was wrong with Ms. Fontana. These guys cared.

Mr. Gerson said: "Better trained experts who will testify in this trial will show you that it was there all along in the data that was recorded in the records and in the X-ray films. You will see it with your own eye and you will hear it explained by these preeminent doctors during their testimony in the trial."

Well, who did they bring? Well, they brought you Dr. Foley. Better trained?

Would you go back to our list of physicians, please? Thank you.

Dr. Foley, the radiologist from Tampa, who

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spends one day a week working on medical/legal matters, stuff just like this -- I'm sorry. The list of -- thanks.

Better trained? Was Dr. Foley better trained than the folks at Jackson Memorial Hospital?

MR. HUNTER: Judge, I object to this. There's no evidence of the training of any of these physicians.

THE COURT: Sustained.

MR. REILLY: The folks at Jackson Memorial Hospital are the folks that are going to do the lung transplant on Ms. Fontana. Jackson Memorial Hospital was described in this trial as one of the top 50 medical centers in this country.

Dr. Irvin. You heard Mr. Engram talking just a minute ago about Dr. Irvin and what he knew about sarcoidosis. I won't repeat it. I think Jonathan covered it very well.

He gained his knowledge about sarcoidosis during the time that he was involved in participating in this litigation.

Let's look at the issues in this case.

Before I move on, the concept of Dr. Irvin

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being more capable of identifying the disease process in Ms. Fontana than Dr. Coopersmith, that's what Mr. Gerson was indicating in his opening statement: Better capable of identifying what's wrong with Ms. Fontana than the physician whose been caring for her for the last six years and still cares for her; more capable of identifying what's wrong with Ms. Fontana than the folks that are going to do her lung transplant.

It's not all together clear to me whether or not the plaintiffs are claiming that Ms. Fontana's sarcoidosis is caused by her exposure to environmental tobacco smoke, but every expert that came to this courtroom without question said, no one knows what causes sarcoidosis.

Now, Mr. Gerson commented on Dr. Engram's recitation of what people have thought might be the cause -- I think it was Mr. Gerson -- about what might be the cause of sarcoidosis. And you know what? Dr. Ingram gave a wonderful short history of what physicians have thought might be the cause. And when he talked about pine pollen, it wasn't some fairy tale. He

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explained that they were trying, from an epidemiology standpoint and a biology standpoint, to figure out why two groups of people seemed to get sarcoidosis more than anybody else. And it was a puzzle. It's still a puzzle.

And what were they looking for? Well, they were looking for: Well, what do these folks have in common? We've got Norwegian folks and we've got African-American folks living in the south, and they both seem to get this disease more often than a whole host of other folks. So what do they have in common?

And one of the things that people thought was: You know what? They have this environment in common. They have pine pollen in common. Is that something to be ridiculed? No, it's a historical thought. But all it points up is nobody knows what causes sarcoidosis.

And here is what Mr. Hunter said in his opening statement: In Marie Fontana's case, no one can prove what caused the sarcoidosis or the breathing in problem.

Well, fine, we agree. No one knows. So

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that must be out of this case.

So what does that leave us with issue-wise? And you heard Mr. Gerson and Mr. Hunter in their closing arguments talk about, "You know what? We have to apportion between the sarcoidosis and the other disease processes."

Well, that assumes that the other disease processes even exist, whether they even exist.

And that is, as I said, the centerpiece of this case. So you're right, he's right. They're both right. The sarcoidosis is over here. And what we're focusing on now is, does Ms. Fontana have any other disease process in her lungs that's caused by environmental tobacco smoke? I don't even care about the second part. Does she have any other disease process in her lungs? Does she have chronic obstructive pulmonary disease? Does she have emphysema? Does she have chronic bronchitis?

And again, ladies and gentlemen, we're going to be looking at a burden of proof, by the greater weight of the evidence in this case.

You know, plaintiff didn't bring a

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pulmonologist to come talk to you. The defense brought one of the preeminent pulmonologists in the country today. His credentials were impeccable. But here is the list of all the folks who have not diagnosed any of those three diseases in Ms. Fontana over a 12-year time span. 12 years, ladies and gentlemen; from 1989 or thereabouts, '88, '89, right on through to 2001, this month.

And who makes up the membership of this group? Well, there's Dr. Foley from Tampa; Dr. Irvin, not a medical doctor, from Vermont; Dr. Gardiner, who you got to see yesterday and evaluate his level of knowledge of sarcoidosis; and we heard about an opinion of Dr. Petty, which I'll talk about a little more later.

I'd say the balance isn't even close. Where are the scales? Did this group of folks lift, lift that balance and put it in favor of the plaintiffs in this case? Did they do that? Did these folks' opinions outweigh all the opinions recorded by people who are trying to identify and treat the conditions in Ms. Fontana over more than a decade?

The plaintiffs early on in this case,

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because the science doesn't move in their direction, keep asking you to apply your common sense. And you know what? Right now I'm doing the same thing. I'm asking you to apply your common sense.

When we look at the incentive of folks to come up with a diagnosis of those diseases, what incentive did these people, starting with Dr. Greene and going all the way down to Dr. Fertel at Jackson Memorial Hospital, what incentive did they have to not diagnose any of those diseases in Ms. Fontana?

You heard from Dr. Ingram that if a patient has any of those three diseases in addition to advanced sarcoidosis, they're going to get a different form of treatment than if they just have sarcoidosis.

He explained to you that they're going to get bronchodilators, they're going to get steroid inhalants, because they're going to try to open her airway to improve her ability to expel air.

Does it make sense that every one of these doctors, starting with Dr. Greene and going all the way down to Dr. Fertel, would say: "You

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know what? It's really not important for me to know whether or not she had COPD or whether she has emphysema, because, you know, I might want to treat that differently, but I don't really care about it in this patient."

Does that make any sense to you? Of course not. Of course not.

Does anybody know what caused Ms. Fontana's sarcoidosis to progress? Anybody in this world? Nobody in this world knows. I asked Dr. Foley, their radiology expert, the only medical doctor they brought to this courtroom, the only one.

Do we have Dr. Foley's quotes? That's fine.

I said: "Doctor, again, no one knows what causes it or why it progresses in people, do they?"

And his answer, candidly, was: "No."

Can you see that with this board up? I'm sorry.

Now, a little later in the cross-examination, I said: "And no one knows why it progressed in Ms. Fontana, do they?"

And Dr. Foley candidly said: "That's

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correct."

No one knows. Research goes on today to try to figure out why folks like Ms. Fontana get it and why, unfortunately, in 15 to 20 percent of the people that get it, it progresses to where she is today.

It is a medical mystery that everyone wishes they had the answer to. But no one does.

Was there anybody -- was there anybody who came -- was there a medical doctor who came here and told you that they knew why Ms. Fontana's sarcoidosis progressed? No.

Dr. Ingram explained to you that no one knows why it progressed. Dr. Koenigsberg explained to you no one knows why it progressed. Dr. Foley explained to you no one knows why it progressed. Those are all the medical doctors that came into this courtroom.

But I invite you to look in all the medical records generated by the people who are treating her, and watch the frustration come up from the pages of their records watching this poor lady get sicker and sicker and sicker.

Now, Jonathan Engram said in the mid '90s

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her sarcoidosis was controlled. What he means by that is that the symptomatology wasn't becoming troublesome. But her sarcoidosis clearly wasn't controlled. It was progressing, progressing, progressing, progressing to the point where she is today. A true tragedy.

Ms. Fontana did complain about environmental tobacco smoke one time to a physician, sort of. In a discussion with Dr. Coopersmith, on her first visit to him, she was indicating -- do we have that note?

She was indicating that she became more short of breath with exertion on flights. She's already short of breath, her sarcoidosis is shrinking her lungs and compromising her ability to breathe properly. That's what sarcoidosis does.

And she said when she's on flights and exerts herself, especially if it's in the smoking section, she finds herself more short of breath, that's dyspnea, at higher altitudes. And I asked Dr. Ingram if he would explain that to you folks. He said, "You know, being in the smoking section makes her more aware of it. What's going on in her lungs is that she isn't

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able to have that gas exchange where the alveoli meet the capillary system, where the blood vessels that are making those red cells move by -- right by the alveoli, those little balls where the oxygen is being taken up by the red cells and carbon dioxide is being taken off, there's not enough interaction in there in the short time that those red blood cells go by when you're exerting yourself for the gas exchange to effectively take place. It's made more accentuated by the fact that she's in a high altitude environment."

That's exactly what Dr. Ingram was telling you. He was explaining that at higher altitudes we have thinner air, less oxygen in the air. And as a result she gets short of breath.

Now, did it continue without cigarette smoke in the air? Absolutely.

Let's see the next note where this problem is identified by Dr. Coopersmith.

What's the date on this? 10, either 4- or 9-95. Approximately that date.

Ms. Fontana continues to work as a stewardess at TWA. She gets somewhat more

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short of breath when she flies to Denver.

Now, this is 1995. There's no smoking on flights to Denver. She gets more short of breath on flights to Denver. Why? Dr. Ingram explained to you, it's the mile-high city. This is her sarcoidosis at play. But I don't mean play. Or the plane reaches 44,000 feet. Otherwise, she is doing well. "Well" is a relative term obviously.

But there you are. That's the problem. The gas exchange is not occurring effectively at high altitudes.

Now, it doesn't even require the exertion. That's the nature of the progression of this disease. In six months she's gone from, it's during exertion, to now it's when she's on the plane at high altitude.

Now, let's look at the next time this subject comes up.

The date on this is in 1997. I think it's 11th.

10-7. Sorry. 10-7-97. These records will all be with you in the jury room.

She wants to go to New York. She's not even working for the airlines now. She wants

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to go to New York for a vacation. She'd like to fly. She's a former TWA flight attendant. Free passes. She'd like to fly to New York.

He tells her: Look, it's okay with me if you go, but, please, take a car, take a train, because I'm afraid that at the high altitude, you're going to have another episode of hemoptysis, that's bleeding, most likely due to the changes in the atmospheric pressures.

Because you learned during the course of this trial -- I didn't know this until I was involved in this -- when you take off, planes aren't pressurized. When we leave here in Miami, that plane isn't at sea level; it gets pressurized at 7, 8, 10,000 feet.

Now, when you look in Dr. Coopersmith's notes you will not find a note that says, "Please avoid environmental tobacco smoke; don't fly on planes that have it; don't fly on the smoking section; don't work in the smoking section." You won't find a note like that. But you will find a note that says, "Please, don't go to high altitude. Please stay on the ground because high altitude is bad for your lungs."

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Let's get to the central issue in this case again, and that is, what do all these treating physicians -- remember, Mr. Gerson said dark ages; they don't know what to look for; they didn't know to look for an obstructive disease.

Starting in 1989 -- you know, that's just 12 years ago. Think of where you were 12 years ago.

Let's start in 1989. And you know what? I did not -- I could've put up -- you'll see every record I could've put up. Could have. My mother would kill me. That I could have put up. I could have put up every X-ray that was examined. I could have shown you every radiographic report. I could have shown you every pulmonology record. I could have shown you every pulmonology function test, PFT. I could have shown you every flow-volume chart. They are all in here. You will see them all. But I didn't.

What I did was I gave you examples spread over time. I gave you an entire continuum of the medical records. I did it for a reason. I tried to be a little selective anyway, so that

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you got a sampling from each era.

What I'm going to do know, Mr. Gerson said that when Dr. Ingram was on the stand, he never even looked at an X-ray, never demonstrated an X-ray to you. I don't know why he said that.

And the reason I'm talking about it right now is because you'll remember that I had probably, His Honor thinks, I spent overly long with Dr. Koenigsberg going through lots of X-rays and lots of CT scans.

And I didn't, I didn't want to repeat that same exercise with Dr. Ingram. I could have, if His Honor had let me and not said it was cumulative or repetitious or something like that, but I did it out of deference to you folks. You had seen it. I didn't think you needed to see it again.

But I did ask him -- I thought, what is the most important thing to show you? The most important thing to show you is the most recent event. So I had him look at, and here's the testimony. I said: "Doctor, I'm going to take you quickly to the Jackson Memorial Hospital CT and chest X-ray films of June 2000." I don't know whether Mr. Gerson wasn't in the room at

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the time, but I put those up on this same screen.

And I had them -- I had Dr. Ingram interpret them. I did it so you would know what his opinion was about the CT scans and the X-rays in this case.

I could have asked him to look at all of them, but I think that would have been an abuse of your time.

And I think if I read this whole thing that I've highlighted for you, that would be an abuse of your time, too. But for three pages of this trial transcript, I went over the interpretations of those CT scans and chest X-rays with Dr. Ingram.

And at the end I asked him if his findings are all consistent with the findings of the folks at Jackson Memorial. And he said, "They are."

All right. Now, I'd like to, and I apologize for doing this, but I think it's necessary that I take you through a quick journey through three types of these medical records, the pulmonologists' records, to show you what disease they found and what diseases

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they considered, the pulmonary function test results and the X-ray reports. I'm just going to do about three or four of each. I'll do them very quickly and then I'll move on.

You want to start with the pulmonology reports? Is this Dr. Greene?

This is Dr. Adelman's record. This is Dr. Adelman saying: "Sarcoidosis with clinical and physiologic evidence of restrictive lung disease. Suspect pulmonary fibrosis at this point."

This is Dr. Greene, so that was Dr. Adelman, the first pulmonologist who took care of her. Here is Dr. Greene, the second pulmonologist: "The patient has chronic sarcoidosis."

Neither one of them make any mention of any problem of an obstructive disease of any kind.

Can we go to Dr. Coopersmith?

"Carries a diagnosis of sarcoidosis since 1986."

Do we have another Dr. Coopersmith? Can we go to Jackson Memorial, please?

Dr. Schwartz. This is Dr. Schwartz. This

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is his record of January 1997: "54-year-old female with advanced sarcoidosis and recurrent hemoptysis. Stage IV sarcoidosis with fibrosis and cystic changes."

And this, ladies and gentlemen, is the assessment at Jackson Memorial Hospital in June of 2000. Why is she getting her lung transplant? The only disease, the only disease. And you remember that Ms. Fontana came here and she said: "You know what? The folks at Jackson Memorial Hospital examined me from head to toe. They wanted to know how I brushed my teeth. They wanted to know everything about me."

Of course they do. They're considering her for a lung transplant.

What is the single disease that she is being considered for a lung transplant for? Sarcoidosis.

Can we take a look at the radiology reports, please?

This is a September 4th, 1989, record from Dr. Laurie Jalens. She says her impression is bilateral hilar adenopathy, consistent with a known diagnosis of sarcoid. So that's -- she's

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made the determination of sarcoidosis.

Dr. Richard Beerman. This is 1990, 1-26-90: "Bilateral hilar adenopathy."

You've learned more about bilateral hilar adenopathy than you ever dreamed you would. "Interstitial and nodular changes in the apices."

Remember, Dr. Gardiner didn't even know that that's where sarcoidosis resides in the apices, bilateral. He said, "I don't think that's -- I don't think that's right."

That's how much Dr. Gardiner knew about sarcoidosis.

"These findings are slightly more prominent than the prior study of 11-29 and are consistent with the patient's diagnosis of sarcoidosis."

This is Dr. Weiner. The date on this one is 1-14-94: "Plain radiographic findings suggestive of extensive mediastinal and hilar adenopathy, as well as infiltrates. These radiographic findings are nonspecific but would be suggestive of sarcoidosis." Other granulomatous disease of lymphoma would be in the differential diagnosis.

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There he is. Mr. Gerson said, "You know, sarcoidosis is not a difficult disease to diagnose radiographically." And I agree. There you go. It's only difficult for Dr. Gardiner, who, if you remember, on the January 6th, 1997 chest X-ray for a lady who has been diagnosed with sarcoidosis now for 17 years, makes no mention of sarcoidosis in his differential.

Why not? Because he's simply not familiar with it.

Here's Dr. -- I apologize to Mr. Mazzeo or Mazzeo in abstentia. I probably injured his name.

These findings, this is the combination of -- he's got two X-ray modalities, what they call modalities, that he's looking at at the same time. He's looking at a chest X-ray and he's looking at her first CT scan. Her first CT scan.

"These findings within the lungs would be compatible with the diagnosis of sarcoidosis, though the differential would include etiologies, including lymphoma and metastatic disease."

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He didn't have any problem.

And this, ladies and gentlemen, is Dr. Fishman. He's at Jackson Memorial. What's the indication here? "58-year-old female with sarcoidosis and lung fibrosis. She's on her pre-transplant work-up."

And you heard those are the same findings as everybody else, everybody that says sarcoidosis.

And you just saw the report of Dr. Fertel. She's the head of the lung transplant. She's the associate professor at Jackson Memorial in charge of the lung transplant program. She's the one that did the assessment that said the reason why she's in this list is because of her sarcoidosis.

These now are the pulmonary function tests. So I've shown you the office notes of the physicians who were making the diagnosis, the radiographic reports. Clearly, I haven't shown them all to you. If I did that, His Honor would be telling me that it's time for me to sit down a long time before I was done.

So here are the PFTs. You remember, Mr. Gerson said, "They don't even know to look

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for obstructive disease in 1989." Ronald Reagan or Reagan's era. Apologize to the President.

Look at the first entry. No evidence of airway obstruction disease. Ladies and gentlemen, they not only know to look for it, they do look for it. That's the earliest record we have. Why didn't he tell you that?

"No change post-bronchodilator." What does that mean? You remember what Dr. Ingram said. He said, "You know what? For people that have obstructive airway disease, we give them bronchodilators to open their airways so they can expel air more easily when you perform a pulmonary function test. They have the test done twice, they do it once and see how you do it without bronchodilators, then they give you bronchodilators and see if it improves your performance."

There you go: "No change post-bronchodilator. No airway disease. Lung volumes confirm moderately severe restrictive disease."

Mr. Gerson said, "You know, that Dr. Ingram only showed you one" -- maybe it was

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Mr. Hunter that said that. He only showed you one volume. In fact, that's so wrong. Dr. Ingram went through the flow-volume charts with you. He went through the PFTs. He talked about lung size. He talked about the FEV1/FVC, forced expiratory volume. He explained all this to you in great detail.

Remember that sarcoidosis is a restrictive disease. Dr. Ingram explained that to you, I thought very well: "Given the patient's history of sarcoidosis, these finds are consistent with pulmonary interstitial involvement seen with this disease."

That couldn't be clearer. Mr. Gerson, in his opening statement, said, "Not well trained enough to identify the disease." And today he told you, "Weren't looking for it."

Ladies and gentlemen, neither one of those -- you know why they tell you that? They tell you that because they've got to have some explanation for why it's like this. I'm sorry for shouting, but that's the truth. The truth is, they've got to have some explanation for why the ledger is so heavily weighted on this side.

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So what's their explanation? Their explanation is, "You know what? In the beginning it was because they didn't have enough training. Today it's because they didn't know to look for it."

I'm going to give you two other explanations that Dr. Foley offered that are equally as valid in just a minute.

That one didn't come out very well.

This is a 1993 report. I don't know if you can read it very well. But it says -- anyway, it just says restrictive disease. You'll see it in the jury room and it's a much better version than what's on the screen.

Let's go to another one.

This one is Dr. Coopersmith from September '95: "Moderate restrictive disease, moderate decrease in VLCO." That's the diffusing capacity. "And no change after bronchodilators."

Do they know to look? Do they know to test? Was Mr. Gerson right, they didn't know to test? This is 1995. Is she being administered bronchodilators to test if she has an airway obstruction disease? Did he read

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these records? Do you seriously think I would cross-examine Dr. Coopersmith?

This is from Holy Cross Hospital: "Restrictive lung disease pattern with associated diffusion defect." Restrictive, not obstructive, over and over and over again.

There is not one -- while there may be one radiologist that says severe COPD, Dr. Gardiner, there is not one pulmonologist and there is not one pulmonary function test interpreter who says anything but a restrictive lung disease, anything but sarcoidosis.

Do we have another one?

This is from Jackson Memorial Hospital. Do you remember how Dr. Ingram put up that flow-volume chart and he explained to you exactly -- he put up an example. Did the plaintiff's experts bring in one example of a doggone thing? Did Dr. Foley bring you any examples of that centrilobular emphysema and put it up to an X-ray of Ms. Fontana's and say, "See, with your own eyes, do a comparison?" Did Dr. Irvin bring in a flow-volume chart and put it up next to Ms. Fontana and say, "See, see what it looks like"?

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Did Dr. Koenigsberg bring you examples and put it side by side so you could compare it? Did Dr. Ingram bring you examples so that you could compare with your own eyes side by side?

Did I bring a textbook example of what sarcoidosis looks like in the lung? You saw me show it to Dr. Gardiner. You had seen it previously on the screen. Dr. Gardiner had never seen such a thing.

He said: "Hoof beats in Florida, I think horses. I don't think zebras."

You know what? If you don't know what you're looking for, if you don't know what it can look like, you're always going to diagnose COPD, because you don't know that there is another disease process that this goes with.

Let's talk about better trained.

All right. I told you that Dr. Foley offered a couple of other explanations to try to explain away this great discrepancy. One of them was that it's such a common thing, such a common thing that emphysema, that COPD, you know, we radiologists, we just read right through it; we don't even bother to write it down.

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Imagine that. Imagine being a patient up in Tampa, being under the care of a pulmonologist, and having your chest X-ray or your CT scan go to Dr. Foley and he doesn't report emphysema that he sees under X-ray because he sees them a lot. Imagine what the quality of medical care is if that's the way he treats patients. Frightening.

You know what? He knew that wouldn't hold water, so he offered another explanation from that very chair. What was his other explanation? Something he called interobserver variability.

I keep approaching. Sorry.

He said, "Look, two doctors can look at the same film, and one can see emphysema and one cannot, and they can both be right. They can both be within the realm of providing appropriate medical care."

Well, maybe if it was really a close call. Maybe if you had some piece of pathology and the cells looked a little -- and maybe they looked malignant and maybe they didn't or maybe they looked like some disease process or maybe they didn't. Maybe if there was a big question

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mark.

But did Dr. Foley go on and say, "You know what? I had a hard, hard, hard time finding all that emphysema. There was just a little bit here or a little bit there."

Is that what he said? Heck no. He said, "I see emphysema everywhere. It's everywhere and it's getting progressively worse. So bad that by the time 2000 rolls around, her emphysema is so bad that if it weren't for her emphysema, she wouldn't need a lung transplant."

Now, can you match up interobserver variability and that level, what he claims to be the level of emphysema in her lungs?

Let me put you back in Tampa. Can you imagine being a patient in Tampa --

MR. HUNTER: Judge, this is golden rule argument. I object to it, asking the jury to imagine being a patient.

THE COURT: Well, it's close. Be careful.

MR. REILLY: Ladies and gentlemen, imagine a patient in Tampa. Imagine a patient in Tampa who has -- or doesn't have emphysema. And you have Dr. Foley looking at the X-ray and you

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have another radiologist who says, "I see no emphysema whatsoever." And Dr. Foley says, "I see it everywhere. We're going to start treating this patient."

Of course, Dr. Foley doesn't get to treat the patients. Fortunately, we have a barrier between the Dr. Foleys of the world, between the Dr. Foleys of the world and the patients. And who are they? They are the pulmonologists. And fortunately in Ms. Fontana's case, we had a barrier between Dr. Gardiner and Ms. Fontana's care and treatment.

That barrier was Dr. Coopersmith and Dr. Adelman. Look at their records.

Do we have Coopersmith's discharge summary, 12-24-95? I'll give you a minute.

I catch these people; I just test them. I just want to know if they're on their toes. They're very good.

You'll be looking in just a minute at a discharge summary and a history and physical. The discharge summary is Dr. Coopersmith's and it's the day after Dr. Gardiner writes his report of his interpretation of the CT scan.

If they don't find it, I'll tell you it's

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dated 12-24-95. It's in those records. Please take a look at it. You will see -- I've actually put it up during the course of the trial. You will see that nowhere does he say: Severe COPD or any kind of COPD.

There you go. Well, actually this is close. This is -- what happened was, Ms. Fontana was discharged -- it's just not quite right. Great. This is the right one.

This is his discharge summary. After Dr. Gardiner has written: "Severe COPD. Right upper lobe fibrosis with massive hemoptysis. Sarcoidosis with pulmonary fibrosis." Do you see any mention of severe COPD there? Heck no. Thank goodness for the barrier.

Let's go to Dr. Schwartz's admission.

Ms. Fontana, what happened was Ms. Fontana went into the hospital on the 23rd or thereabouts, might have been about the 20th. She was spitting up blood. And the blood was coming from her lungs and they didn't know why. And you'll see in these records that they were very concerned that she might have a fungus ball because of her sarcoidosis.

It turns out -- and that's what they were

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asking, that's why they wanted the CT scan, to see whether or not she had a fungus ball, because it's a complication of folks that have bilateral apical sarcoidosis. They were fearful that she had what she ultimately developed.

And so she went into the hospital. They tried to diagnose her. They released her, discharge on the 24th. She had another episode of bleeding and she went back in the hospital a few days later.

It was Dr. Schwartz, Dr. Coopersmith's partner -- I think they're partners; I don't really know -- but, anyway, he was covering for him. It was the holidays. You can see, January 2nd. He admits her and says, "This is a 54-year-old female with advanced sarcoidosis and apparent hemoptysis. The patient is Stage IV sarcoid."

He then interpreted the CAT scan himself. This is the same CAT scan, ladies and gentlemen, that Dr. Gardiner had interpreted just a few days before. And you will see a striking dissimilarity between this report by Dr. Schwartz and the interpretation by

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Dr. Gardiner.

I think you see what happened here. Dr. Schwartz and Dr. Coopersmith say: "You know what? The guy is just wrong," and they go ahead and treat her for what's really wrong with her, her sarcoidosis.

Your Honor, how much time do I have left?

THE COURT: 40 minutes.

MR. REILLY: I'm in good shape. Let me talk a little bit about Dr. Gardiner.

Dr. Gardiner came here and clearly indicated by his own admission that he is not an expert in sarcoidosis. He indicated he's never seen bilateral apical sarcoidosis; definitely without fungus balls, bullae and blebs and apices of the lungs.

I showed him the picture. I mean, this is a picture of classic Stage IV sarcoidosis; I mean, an artist's rendering of this classic disease appearance. He thought maybe he'd gone to a seminar one time and maybe he had seen it depicted in one lung, unilateral not bilateral. That was his level of expertise.

And you can tell how experienced he was with sarcoidosis because of the report that he

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wrote when he interpreted the chest X-ray, and failed to make mention of sarcoidosis within his differential diagnosis.

One thing he did note, one thing he did know was that emphysema is a thin-walled disease. In other words, the holes that are created with sarcoidosis are thick-walled; the holes that are created with emphysema are thin-walled.

Now, he didn't describe in his radiology report whether the walls of the holes that he saw were thick or thin.

But, ladies and gentlemen -- do we have the Jackson Memorial Hospital --

You'll have this report from Jackson Memorial Hospital of their CT in the year 2000. And without doubt, they describe those cysts as having thick walls. If there's any question as to why those holes are there, it's because of that stretching and tearing that the shrinking of the lungs causes or suffers because of the sarcoidosis. There it is, by folks who know and whose job it is to decide and to do the lung transplant.

All right. Ladies and gentlemen, I have

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bent your ear long enough. Let me just tell you that you could disregard -- well, I should probably touch on Dr. Petty. I didn't talk about that.

What we know about Dr. Petty we've learned through Dr. Irvin.

The plaintiffs did not bring a pulmonologist here. What we learned was that Dr. Petty purportedly had a conversation with Dr. Irvin in Vermont. There's a term for what happened there. It's called a curbside. What Dr. Irvin described was Dr. Petty was up there for a seminar of some kind, some other meeting.

Dr. Irvin says: "Hey, look. I'm involved in some litigation." What he inferred was: "I don't know how to read these CT scans. Would you take a look at it?"

And he asked Dr. Petty, his old friend from out in Denver, he said, "Would you take a look at this?"

Now, did he show Dr. Petty the medical records? He had every medical record. He could have shown him all the medical records. He had all the X-rays, all the CT scans. He could have shown him all these things. This is

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a pulmonologist, the people who deal with PFTs. He could have shown him the pulmonary function test.

And he could have said, "You know what? All these PFTs are interpreted as restrictive. I'm the only guy in the world, certainly the only guy who has ever looked at these PFTs who thinks that they reflect an obstructive feature.

When we look at the balance, when you talk about interpreting PFTs, you know, that list looks like Dr. Irvin versus every pulmonologist. These are radiologists and pulmonologists. But every pulmonologist and everybody who interpreted a PFT is on the other side of that scale.

Now, the plaintiff's answer is, he's the best in the world. Ladies and gentlemen, they can't all be wrong and only Dr. Irvin be right. What's the greater weight of the evidence on this issue? I think it's pretty doggone plain.

But, anyway, Dr. Petty purportedly meets with Dr. Irvin. They have conversation; didn't show him any of the records.

MR. HUNTER: Judge, can we approach?

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THE COURT: Not at this time. He's almost through.

MR. REILLY: He puts up the CT scan and he says, "What do you see?" And he says, "I sure see sarcoidosis." And then Dr. Irvin reports to us that Dr. Petty also reported that he saw something else going on, emphysema.

Now, do we know whether that's right or not? We have no way of knowing. Do we know whether or not Dr. Irvin said: "Do you see anything else going on?" Can you imagine two people talking and one person says, "You know, this is what I'm doing. This is what I think, and what do you think?" How often people say, "Oh, yeah, I think that might be right, too," whether they think it or not. But that's -- but I don't have a problem putting Dr. Petty over here, because does that change the balance of the greater weight of the evidence to any significant degree? Did Dr. Petty take care of this lady for a dozen years? Did he consider her for a lung transplant?

In the final analysis I think, and I'm sorry if I did this overly long, but ladies and gentlemen, the evidence in this case is so

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compelling, it is so compelling that, unfortunately, Ms. Fontana is one of those people that gets this disease more often than anybody else, and one of those people in whom this disease progresses more often than anyone else. It is a tragedy. It is a fact. She has sarcoidosis. It is costing her her life, unless she gets a lung transplant.

And that leads me to the final topic that I need to talk to you about, and it was touched on by Mr. Gerson, Mr. Engram, and I'll talk about it for just a minute. And that is, those two native emotions that each and every one of us has, and they are sympathy and compassion. If you didn't have them, you wouldn't be normal.

You will feel them. You will feel them. Everyone in this room feels them. Everyone in this room feels sympathy and compassion for Ms. Fontana. It would be unnatural for everyone not to. By all accounts she is a delightful lady. By all accounts she was a wonderful mother, an interesting person. She is a wonderful mother, interesting person. And a great friend. Multilingual.

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But that is not what this system is built on. This is a court of law. This Judge is going to instruct you, and I haven't memorized this, but this is what it's going to say: That you are not to be swayed from the performance of your duty by prejudice, sympathy or any other sentiment for or against any party.

For or against any party.

And I am confident that no one wants you to do anything but render your verdict in this case based on the evidence that came to you either from that witness stand or from the medical records and employment records, et cetera, that we've put into evidence.

It is the backbone, you are the backbone of our civil judicial system. You have been incredibly attentive, incredibly patient. And on behalf of the defendants, I know we thank you and I'm sure that the plaintiff's counsel thank you as well.

I know that to overcome compassion and sympathy takes courage, but it is necessary.

Now, on behalf of Philip Morris and Lorillard and Brown & Williamson and RJ Reynolds, all we would ask you to do is weigh

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this case according to the evidence that you've seen from the witness stand and the instructions the Court gives you.

And when you get a verdict form, because there is a verdict form that's going to ask you one question -- first question is going to be: "Do you find that Ms. Fontana suffered an injury that was legally caused by her exposure to environmental tobacco smoke on board aircraft?"

And the answer to that question is "No." And that is all we would ask you to do.

On behalf of all the defendants, I thank you very much for your attention.

THE COURT: Ladies and gentlemen, you've been sitting for two hours. Would you like to take a ten-minute recess? I see very affirmative.

We'll take a ten-minute recess.

(The jurors exited the courtroom.)

THE COURT: Mr. Hunter, we'll take up that matter in just a couple minutes.

MR. HUNTER: Yes, sir.

(A brief recess was taken.)

THE COURT: Mr. Hunter, you had something?

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MR. HUNTER: Well, Judge, what Mr. Reilly kept doing in his closing was saying that Dr. Petty purportedly read this CT scan in Vermont, and he purportedly had read -- and this is something that I brought to the Court's attention yesterday, is that I wanted -- I said they were going to attack whether or not that event occurred.

And then, sure enough, Mr. Reilly gets up and says, "Purportedly this event occurred." And purportedly -- I mean, had I gone ahead and taken the deposition of Dr. Petty in Denver, like I'd wanted to, there wouldn't have been any argument that maybe this didn't happen.

But Mr. Reilly just went over it and then he did it again, and that's when I came up out of my chair because it was just so improper to stipulate that we could allow the testimony to come in through Irvin and then attack it as though it didn't happen. That's what I was objecting to.

THE COURT: I understand. We'll take that under consideration.

MR. HUNTER: I would move for mistrial and ask you to reserve on it.

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THE COURT: I'll reserve definitely. Not going this far without reserving.

All we need is the clerk or a bailiff.

(A brief recess was taken.)

THE COURT: Mr. Hunter, I think maybe your client is outside.

MR. GERSON: We're not going to bring her in until you charge the jury.

THE COURT: That's tomorrow. It's too late now.

MR. WEINSTEIN: Judge, most respectfully, before we leave, I have a two-minute request of the Court after Mr. Hunter.

THE COURT: Have I ever denied you one of your two-minute requests?

MR. WEINSTEIN: No, sir, and thank you very much.

MR. UPSHAW: Just so you're aware, I spoke with Mr. Hunter and he's not going to mention any numbers, so we don't have to worry about that issue.

THE COURT: Okay. Good afternoon.

MS. FONTANA: Good afternoon.

THE COURT: Bring the jury in.

(The jurors entered the courtroom.)

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THE COURT: Have a seat, please. Let the record reflect all our jurors are present and accounted for.

Mr. Hunter, are you ready to conclude?

MR. HUNTER: Yes.

THE COURT: You may proceed.

MR. HUNTER: May it please the Court. Counsel, ladies and gentlemen, this is it. This is the final presentation I'm going to make. I'm not allowed to go into anything new at this point on rebuttal. We all have equal time. I don't have more time than Mr. Reilly, but I do have an opportunity to rebut the things that he and Mr. Engram have told you this afternoon.

And Mr. Engram analogizes, this is the second time he's done it, that this is like a baseball game, and they go second.

Wait. This is not a baseball game. This is the one day in her lifetime that Marie Fontana has the opportunity to have you deliberate her case. It's no game. This is deathly serious.

Mr. Reilly ended his remarks with you by stating that there's a native emotion that we

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all have, sympathy and compassion. And he referenced the verdict form on prejudice and sympathy.

And then he went on and he said to you: "In order to rule for my client, in order for this jury to find for my client, it takes courage." And that is a technique to let the jury think that in order to rule for the defendant, you have to be courageous and that a verdict for the defense is courageous.

And that is exactly what attorneys are not to do and what jurors are not to do. The prejudice-and-sympathy charge says that your verdict must be based on the evidence that has been received and the law. In reaching your verdict, you're not to be swayed from the performance of your duty by prejudice, sympathy or any other sentiment.

For a lawyer to say, "Rule for me and it will be courageous; rule against me and you lack courage," is an appeal to sentiment.

Two things struck me when the conclusion of the defense's argument was done. Why did they not bring before you any physician on this list? They put up this list and the first

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misleading argument was that all these people said "No" to emphysema, COPD and chronic bronchitis, and these people were the ones that said "Yes."

Well, that's not correct. These people didn't mention it. Why did they not -- why were they frightened to bring any one of these doctors in here to this courtroom? Mr. Gerson put the challenge to them: Why did you not bring any one of these doctors?

If they all said what you are telling the jury they would say, why not bring one, two, three or all of them? Why only the two hired guns? And that is a question that he didn't answer --

MR. UPSHAW: Objection, Your Honor.

THE COURT: Overruled.

MR. HUNTER: He didn't address -- and I ask you to think about it. If they said no, why didn't they bring any of them in here?

And then they put the list up there on the other board, which seemed to be like so many doctors that had seen Marie, but they had Dr. Coopersmith in there eight times. So I couldn't see it that well, because I can't see

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back there, but I went up and looked at it. But that list was intentionally made to look longer than it was by repeating doctors over and over again. Dr. Schwartz or Dr. Greene was on there four or five times.

Now, Mr. Reilly said that I spent half my time talking about general causation in my closing arguments. And that wasn't really important, general causation wasn't an important feature of the case.

If general causation, if that issue was not important, why do you think Judge Wilson is now going to give you this instruction that as a matter of law, environmental tobacco smoke is harmful to one's health, and it causes, it does cause chronic bronchitis, emphysema, chronic obstructive pulmonary disease?

That chart or that memo that was written in 1988 by the RJ Reynolds Tobacco Company that said: "Focus the debate on air quality and not environmental tobacco smoke," is the methodology of the tobacco industry, and it has been for decades.

MR. UPSHAW: Objection.

THE COURT: Overruled.

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MR. HUNTER: Look here and don't look here. And they've done it in this case and they continued on to do it.

Mr. Reilly said, "The focus of our defense is specific causation." He said, "The central issue in this case is whether there's any other disease process."

Well, I ask you to recall the witnesses that they put on. They had Mr. Ogden on almost all day. Now, if the focus of their defense was, "Does she have bronchitis," or "Does she have sarcoidosis," why did they waste a day of your time with Mr. Ogden -- or Dr. Ogden?

Why did they spend nearly $70,000 on Dr. Teaf, to have him testify, although they had never done anything except environmental pollution? Why did they retain him a year ago and spend almost $70,000 on him, if really the principal part of the defense was whether Marie Fontana has a combination disease process?

And if the principal -- and here is the last thing. If the principal focus of the defense in this case was whether Marie Fontana has bronchitis, emphysema or COPD, why didn't they call Dr. Coopersmith? Why didn't they

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call Dr. Adelman? Why didn't they call any of the doctors on that chart? Because they're afraid to do it. They want to have you look at a beautiful chart that's been put together by a company that can put together a slide show, a television presentation, a videotape they'll spend $300,000 on. But they won't bring a doctor in here for you to talk to or for you to listen to, because they want you to look here and don't look here.

And they're good at it. They're great at it. And this was one of the slickest presentations that I've seen in my career. They're the best at that.

MR. REILLY: Objection, Your Honor.

THE COURT: Overruled.

MR. HUNTER: Let's get back to what the centerpiece of this case is, as Mr. Reilly said to you, the central issue in the case. What is the central issue? When you saw Marie, the first time you met her, what did you notice about her? (Noise) She had a little cup. She had a napkin.

Do you know Mr. Reilly never mentioned the word "cough" one time as he gave his

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presentation? He never said it.

And you know, Dr. Ingram, we can go back and look -- because we have things that we never had before. We have these things that can print up what everybody said as it's said. I can see, if I stand up and speak, I can see my words come on this screen. And one of the things is, we can look in a computerized index and look for words.

And I decided, you know, Marie Fontana's cough is probably the central part of this case, her bronchitis is probably the central part of the case. She's been coughing for so many years. Why would that not be something that we would want to focus on?

So I looked up the word "cough" when Dr. Ingram was on the stand. And here's what Dr. Ingram's testimony was about cough:

"Question: Maybe this would be a good time for you to explain to the jury what the constellation of disease references, emphysema, chronic bronchitis, chronic obstructive pulmonary disease." This was Dr. Ingram's only testimony about coughing, except when Mr. Weinstein went after him about tobacco

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smoke, and then they started talking about coughing.

But in his direct examination: "Chronic bronchitis is based on what you say to the doctor in response to a question. Do you cough and raise phlegm? The answer is yes."

Now, of all the medical records that have been represented to you to exist that don't say -- and remember, this is the silent witnesses. We don't have the integrity to bring any of these people in. So even though they didn't say anything, assume that since they didn't say anything, they mean no.

But what wasn't told to you about medical records? In Dr. Adelman's records, February of '89: "She has an occasional cough which is white."

March '89: "There's a slight improvement in her pulmonary symptoms of dyspnea and cough."

'95: "Patient has a cough and a lot of congestion. Two to three weeks she has chest pain. Copiuos secretions, can't bring up. Congestion. Last two to three weeks has been congested, bringing up secretions."

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This is '95: "Acute bronchitis."

It's been said to you there's nothing in the records about bronchitis.

Again in '95: "Patient has laryngitis and a cough. She does have post-nasal drip which makes her cough intermittently."

"She's had post-nasal drip from the very beginning. Post-nasal drip and cough."

"She has a constant post-nasal drip. She claims" -- this is 12-96, "secretions choke her at night."

'97: "Cough increasing." '97 again: "Coughing still." '97: "Still has residual cough. Occasional cough. Tesolen pearls is needed for cough." They describe Hycoden for her cough. "Possible purulent bronchitis, again, as pertaining to coughing up phlegm."

"Cough all the time nonstop," and that is in '97 again. "Continues to have severe cough with any activity. Hycoden does help." Hycoden is a narcotic.

Now, if you don't call any doctors and you don't -- that you can then say, "Well, we don't have to worry about these guys, because they don't get cross-examined, and we can spend all

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our money on people we trust, and we can bring in people we trust and we won't call any of these other people, and we'll attack Gardiner and say he doesn't know anything, because we're the tobacco industry and we know more about chest physiology and the health of lungs than probably these doctors do and we'll make him look silly."

Well, Dr. Gardiner didn't miss sarcoidosis.

Do you have that CT scan?

Dr. Gardiner, on his CT scan, wrote: "Hilar lymphadenopathy," and discussed, "Consider sarcoidosis."

Now, the argument that's been made to you is since -- well, he didn't mention it on January 6, '97, so I guess that makes him a bad doctor, was the suggestion that since he didn't say it on the plain film, maybe he's not a good doctor and he doesn't know anything. But the same argument could be made: Well, since he didn't put it on there, does that mean it doesn't exist? That's the argument Mr. Reilly has been making for all of these doctors: Well, since it didn't get on the film, that

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none of these things exist.

Well, would that be legitimate for me to make an argument, too, that since Gardiner's film doesn't have sarcoidosis on it, it doesn't exist? See, that argument doesn't hold water.

Dr. Stein, who read a chest film on 1-3 -- this film of Gardiner is 1-5. Dr. Stein, he described it anatomically what's consistent with sarcoidosis, but he didn't put sarcoidosis in his impression. Does that mean it doesn't exist? Does that mean Dr. Stein doesn't know what he's talking about? No, neither one of those is a legitimate suggestion.

Now, if Dr. Stein had come in and testified and you had had an opportunity to see him, evaluate his credibility, then there would be great weight that you could give to what he said. But the industry has decided not to bring a single treating physician in.

Mr. Reilly referred to the testimony of Dr. Ingram, that I was ridiculing his pine-pollen theory in reference -- Norway, it wasn't even Norway; it was Sweden. And I wasn't ridiculing his pine-pollen theory, but what I was saying was he was talking about

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invaders.

And what is tobacco smoke other than an invader your lungs are designed to try to keep out? But once it gets past the hair in your nose and the fly trap and cilia, which are paralyzed by smoke, and once it gets into your lungs, it never leaves.

To have the central part of your case be the specific disease is only because this part of their case that they spent so much money and effort and time on was determined as a matter of law by the Judge. They had no witnesses they called that treated, so they have to rely on the records and say, "Well, since it doesn't say this, the doctors mean it's not there."

The witnesses that I brought in showed you the actual films. You didn't have to rely on reports. You didn't have to rely on the fact that medical science has improved and medical knowledge is better and more complete now than it was in 1989. I brought you real witnesses. I brought Dr. Gardiner in for you to see and listen to.

Mr. Reilly says -- well, he puts up this beautiful presentation with the gentleman over

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there who is typing it on a computer and he says, "I could have brought you every X-ray, I could have brought you every PFT, I could have brought you flow-volume charts, but I don't want to impose on your time unduly." Well, he could have brought you one single witness, too, but he didn't.

Rather than put up a bunch of charts and a beautiful presentation, where there's no cross-examination, and giving an eloquent oratory to you, he could have brought you one witness.

If the centerpiece of his case, if the centerpiece of the tobacco industry's case in this trial before you was whether she has the disease as contended, they could have brought you at least one treating physician, and they elected not to.

THE COURT: You've got three minutes.

MR. HUNTER: I call your attention back to Dr. Gardiner, who came here and testified that he was the head of the department. He was very humble; had to pull it out of him that he was in the head of the department there; that he had been with the hospital for 27 years. He

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was a board-certified physician. To suggest that his opinion is not worthy and has no merit, I suggest to you that that's not appropriate.

Now, you're all going to go on with the rest of your lives and tomorrow this case -- or not tomorrow, but whenever your verdict is done this case will be to you probably an interesting case that you sat on and served as a juror on. But this case is immensely important. And for Marie Fontana, you're her jury, and every day for the rest of her life she'll live with the fact and understand the fact that her jury, you people here, did the right thing.

And I ask you to do the right thing and do what is on the wall, seek the truth. Don't be misled. Stay in the bright light of your common sense. Return a verdict in favor of the plaintiff in this case.

THE COURT: Ladies and gentlemen, that concludes the final arguments.

Again, I'm going to remind you not to listen to any T.V. or read the newspaper, read any articles with reference to this case.

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You have not heard my instructions yet. Do not talk to anybody about the case and do not let anybody talk to you about the case until you've finished your deliberations.

My instructions will take about 15 minutes at the most tomorrow to read. I'm also going to give them to you so you can refer to them during your deliberations.

With that, just remember the rest of my instructions. Leave your note pad on the chair. We'll have them for you tomorrow morning.

And I understand you chose to want to come in at 10:00, easier to travel. Be downstairs on the second floor at 10:00. And Mr. Jackson will bring you up here at that time. I'll read you the instructions, then we'll send you to work.

Again, thank you very much for your close attention.

(The jurors exited the courtroom.)

THE COURT: Mr. Weinstein.

MR. WEINSTEIN: Two minutes, I think I said, Judge.

MR. UPSHAW: Here we go.

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MR. WEINSTEIN: Judge, in light of statements made by Mr. Engram, I respectfully request that the Court reconsider giving the instruction regarding that there are 3,000 other airline attendants that have claims. He opened up the door wide open, contrary to their argument.

He said that they only called five flight attendants, but they have lawsuits, and let me go through the five of them, and he went through detailing their motivation.

He said, "There are only five that they called." In fact, he used the word "only" and, in fact he said they're represented by Mr. Hunter. Then he referred specifically to a Gail Pehling, and he said, "Did she ever get sick?" I mean, that is absolutely contrary to their argument. He said, "Did she ever get sick?"

Now, that is why you should now tell them that there are over 2,000 other people that did get sick. And it's for the purpose of proving that and the purpose of giving the jury that information, that 3,000 other people not represented by Mr. Hunter, because he said:

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"And those five are represented by Mr. Hunter," and, therefore, this jury should be told that there are approximately 3,000 other claims represented by people other than Mr. Hunter, and that they did get sick and these are people who are saying that they did get sick.

THE COURT: Betsy, let me have a copy of that, what's in evidence, the instruction that I turned down yesterday.

MR. WEINSTEIN: I'd say something else, but I promised two minutes, Judge.

MR. REILLY: Do you want a response, Your Honor?

THE COURT: Yes, sir.

MR. REILLY: Your Honor, nothing that Mr. Engram said opens the law in this case and nothing Mr. Engram said opened any door in this case. What Mr. Weinstein is arguing is that you couldn't impeach these witnesses that were brought -- it wouldn't be possible to impeach these witnesses by the fact that they're clients of Mr. Hunter's or you'd run afoul of the idea that you would allow an impermissible piece of evidence to be presented to this jury. That can't be true. You have to be able to

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impeach these witnesses on the fact that they are clients of Mr. Hunter's.

THE COURT: Well, like many things, there are several inferences you can draw from the way the statements were made, that's true.

MR. REILLY: Well, Your Honor --

THE COURT: One of which, if that's all they were doing was challenging credibility, I agree with you 100 percent on.

MR. REILLY: I can't imagine how you can construe what Mr. Engram said to be anything other than an impeachment of the credibility of the five people that came. He said, "They're all clients of Mr. Hunter's," and he even went on to say, just so that the nail was hit right on the head by the hammer, that one of them was candid enough to report that she was here to try to help her case.

If there's any doubt as to what direction Mr. Engram was going with that line of statement, it was pure impeachment of the motive of those folks to come here and testify.

Now, that didn't alter the inadmissibility of the information about these 3,000 other cases. It can't have. And you certainly

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didn't -- I'm sure you didn't advise anybody, when you made your ruling yesterday, that it would be impermissible for Mr. Engram to impeach these -- to present an impeachment of these folks based on their incentive to come testify because they are plaintiffs represented by the same plaintiff's counsel.

MR. HUNTER: Judge, there's one --

MR. WEINSTEIN: The suggestion was that there were only five other flight attendants.

MR. HUNTER: Judge, one of the things where he went, he separated the four from Gail Pehling, and then he told the jury that Gail Pehling never got sick and didn't file a claim. And that simply was never asked of her. There was no question about whether you're sick and whether you've --

MR. REILLY: But that doesn't open the door to put in 3,000 others.

MR. HUNTER: I take it back. There was a question about she filed a claim, but not whether she got sick, and the answer would have been yes.

MR. REILLY: So what? If you don't like what's in or isn't in evidence, you make an

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objection. But the point of the matter is, nothing he said -- Your Honor, it reminds me of the question that Mr. Hunter asked of Dr. Gardiner the other day, about whether he had gotten a phone call from Dr. Petty. What you said to me at sidebar was that's no big deal, basically.

And what I would say to Your Honor is, the inference they're drawing is no big deal. The jury didn't get that by any stretch of the imagination, that there was some other motive in Mr. Engram saying that, other than to impeach the credibility of these folks because they came here to testify to help their own case because they're all represented by Mr. Hunter.

THE COURT: Well, I'm going to look at --

MR. ENGRAM: Your Honor, all of that information was brought out on cross-examination by Mr. Upshaw during this case. And I don't see how it could open any door with respect to evidence that's already been admitted in the case.

THE COURT: We're not going to start until 10:00, and I'll look at the transcript

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beforehand.

MR. WEINSTEIN: I can only submit, Your Honor, the clear implication. In fact, I wrote down only five people were called and let's examine each of them, and they of course have lawsuits represented by Mr. Hunter, and Gail Pehling, of course, she didn't get sick. That's -- well, I've made my argument, Judge.

THE COURT: I'll look at the transcript tomorrow morning; see if I agree with you 100 percent or not.

We'll be in recess.

(Court was adjourned at 4:45 p.m.)

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